The L. E. Myers Company *and* Frank Berenotto. Case 22-CA-12084

31 May 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 13 February 1984 Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to the judge's denial of his motion to strike the Respondent's 9 January 1984 letter containing a newly issued court opinion. The General Counsel contends that the letter is actually an unauthorized brief which the judge could not accept because the deadline for the filing of briefs had passed. We reject this contention because we find that it was within the judge's discretion to admit such supplemental material after the period allotted for the formal filing of briefs had expired.

[2] In view of his decision to dismiss the unfair labor practice allegation, the judge found it unnecessary to rule on the Respondent's contention that this dispute should be deferred to the grievance and arbitration procedures contained in the collective-bargaining agreement. The Board does not reach the judge's discussion of the deferral issue in fn. 3 of his decision because no exceptions were filed to the judge's disposition of it. We note, however, that it was not proper for the judge to postpone resolution of that issue pending his determination of the alleged 8(a)(1) violation. Whether deferral is appropriate is a threshold question which must be decided in the negative before the merits of the unfair labor practice allegations can be considered. In addition, we disavow the judge's discussion of the applicability of *United Technologies Corp.*, 268 NLRB 557 (1984), to the facts here.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me at Newark, New Jersey, on June 27 and September 12 and 13, 1983. Upon a charge filed on December 16, 1982,[1] a complaint was issued on January 27, 1983, alleging that The L. E. Myers Company (Respondent) violated Section 8(a)(1) of the National Labor Relations Act. Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed on December 1, 1983, by the General Counsel and by Respondent.[2]

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Delaware corporation with headquarters in Chicago, Illinois, and an office and place of business in East Orange, New Jersey, is engaged in the business of electrical contracting. It annually purchases goods valued in excess of $50,000 directly from suppliers located outside the State of Illinois. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and I so find.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

The issue in this proceeding is whether several employees refused to work because of abnormally dangerous conditions.

B. *Facts*

1. Events of December 11, 1982

Respondent is under contract with New Jersey Transit to perform the reelectrification of the Erie Lackawanna Railroad. The employees involved in this proceeding worked on a catenary, consisting of a platform and a ladder leading up to a horizontal beam or I-beam. The I-beam was approximately 40 feet from the ground and the electric railroad wires were not energized.

At approximately 7:30 a.m. on December 11, 1982, when the employees in question started out for work, it was snowing. Berenotto testified that there was a "dusting" of snow, with an accumulation of approximately a half inch. He testified that there was no difficulty in driving that morning. Oliver testified that the streets were clear but that the ground and "along the railroad tracks" were covered with a "dusting" of snow. Birkbeck testified that the roads and the ballast on the railroad tracks were clear but that the grass was covered with snow.

Haspel testified that during the course of the morning the snow "slacked off" and that around 10 a.m. he and Kraly proceeded to clean the snow off of the platform. Haspel testified that there was approximately a half inch of snow, but no ice, on the top of the I-beam. Birkbeck

[1] All dates refer to 1982 unless otherwise specified.

[2] On January 9, 1984, Respondent submitted a letter enclosing a copy of a recent court opinion. On January 12 the General Counsel filed a motion to strike and on January 16, 1984, Respondent filed its reply to the motion to strike. The General Counsel's motion to strike is denied. The documents are included in the record as ALJ Exh. 1.

testified that there was a "covering" of snow on the I-beam which they proceeded to push away. He testified that after the snow was pushed away the I-beam was wet, but not icy. Haspel testified that there was no ice on the ladder when they went up, but that there was slush on it when they came back down.

On the way down the ladder Kraly slipped. Berenotto, who did not actually go on the catenary structure on December 11, saw Kraley slip while coming down the ladder. At this point Berenotto and several of the other employees decided that working conditions that day were unsafe. Berenotto told Anderson, the foreman, that the work was unsafe and that he would not do it. Berenotto credibly testified that Graham, the general foreman, told the employees that "if you refuse to work it's going to be considered a voluntary quit." After that conversation two of the employees, Birkbeck and Breen, continued to work. Four employees refused to work.

Berenotto testified that Kraly and Haspel were wearing safety belts but "they had no place to put" them. Similarly, Haspel testified that he had his safety belt on his side but it was not belted down. Pagel, the project manager, testified that linemen working on structures 40 feet high sometimes do and sometimes do not fasten their safety belts. Pagel further testified, however, that "as a lineman if there were any slipperiness or any reason for me to be concerned that I would fasten my safety and keep it fastened by whatever means and methods that I had to use."

The record indicates that three-tenths of an inch of snow fell on December 11. From 7 a.m. to 1 p.m. the temperature ranged from 34 to 36 degrees Fahrenheit. On that day there were 130 employees, together with 6 supervisors, working on the project. After the four employees refused to work, the other employess continued working.

Taylor, the project superintendent, credibly testified that on November 13 a total of 1.28 inches of rain fell, but that the men continued to work. In addition, Taylor credibly testified that on December 11 he received no complaints that the vertical beams were slippery.

Giles, the assistant superintendent, testified that the work in question was not dangerous because the wire was not energized. He testified, "[W]e worked in drizzles or rain before when the structures were wet and there wasn't any problem." Douts, assistant chapter manager of the National Electrical Contractors Association, testified:

> [T]he total industry [i]s such that the lineman work has to be somewhat hazardous and the fact that they do have the outside elements. Their work is all outside, so they do have to contend with the environment. That's basically it, whether it's snow, rain or what. It's there and has to be attended to.

Pagel considered that the work in question under the conditions as existed on December 11 was not abnormally dangerous. Similarly, Taylor testified that in his opinion the weather conditions on December 11 did not constitute abnormally dangerous working conditions.

2. Concluding findings

I find that on December 11 approximately three-tenths of an inch of snow fell at the site in question. The catenary crew brushed away the snow from the top of the I-beam after which the I-beam remained wet but not covered with ice. Similarly, the steps of the ladder were wet but not covered with ice. The crew had worked previously during periods of rain. The crew had safety belts available and while the use of them may have proved somewhat cumbersome, they could have been used. I also find that the other approximately 126 employees continued working after the four employees in question refused to work.

3. Discussion and analysis

An employer does not violate Section 8(a)(1) of the Act if it discharges employees for their breach of a no-strike clause of the collective-bargaining agreement. However, where employees refuse to do work which is "abnormally dangerous," Section 502 of the Act protects that refusal.

The test for determining if conditions are "abnormally dangerous" under Section 502 is an objective one. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 386–387 (1974); *Redwing Carriers*, 130 NLRB 1208, 1209 (1961), enfd. as modified 325 F.2d 1011 (D.C. Cir. 1963), cert. denied 377 U.S. 905 (1964).

In *Redwing Carriers*, the Board stated, in construing the term "abnormally dangerous conditions" (130 NLRB at 1209):

> We are of the opinion the term contemplates, and is intended to insure, an objective, as opposed to a subjective, test. What controls is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances be considered "abnormally dangerous."

Similarly, in *Gateway Coal*, the Supreme Court stated that the honest belief of employees that conditions were unsafe was insufficient to meet the criteria of Section 502. The Court stated (414 U.S. at 387):

> [A] union seeking to justify a contractually prohibited work stoppage under Section 502 must present "ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists."

I believe that the General Counsel has not sustained his burden of showing by ascertainable, objective evidence that abnormally dangerous working conditions existed at the site on December 11. I have found that three-tenths of an inch of snow had fallen, but that the catenary crew was able to brush away the snow from the top of the I-beam and that, while the top of the I-beam as well as the stairs of the ladder were wet, they were not icy. Furthermore, in the past the employees worked under wet conditions. I conclude that the Gener-

al Counsel has not shown that abnormally dangerous conditions of work existed at the site on December 11.[3]

[3] At the hearing Respondent moved to defer this proceeding to the dispute resolution procedure established in the collective-bargaining agreement. In view of my decision to dismiss the complaint it is not necessary that I decide the motion to defer. While I note that in the Board's recent decision in *United Technologies Corp.*, 268 NLRB 557 (1984), the Board deferred a proceeding involving an alleged violation of Sec. 8(a)(1), in that case the union was the charging party. In the instant proceeding the charge was filed by Berenotto and the Union did not participate nor was it represented at the hearing. Indeed, after contacting his local business agent, Berenotto was left with the impression that the Union would not file a grievance on behalf of the four employees involved in this proceeding. See *Fenix & Scisson, Inc.*, 207 NLRB 752, 760 (1973); *Boilermakers Local 92 (Bigge Drayage)*, 197 NLRB 281, 286–287 (1972).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Respondent has not engaged in the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The complaint is dismissed.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.